# There is need to address the judicial 'seesaw' on land courts to unlock hearing of land cases

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**Environment and land courts are welcome judicial organs**

Following public requests, the Constitution of Kenya 2010 established special Environment and Land Courts. Parliament followed by enacting the Environment and Court Act of 2011, with original and appellate jurisdiction to hear matters relating to environment and land. In 2012, Parliament enacted the Land Registration and Land Acts, each placing disputes that may arise under them within the jurisdiction of the Environment and Land Court. In fact, the Land Act, which contains the substantive law on public and private land, vests this court with “the exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act”.

**Land cases are technical and complex**

These courts were welcome owing to our experience with land cases which tend to be rather technical and complex. The determination of land cases calls for a good appreciation of the range of land rights recognized under our legal regime, types of property boundaries, diverse transactions and the powers bestowed on the various organs created under the different land laws. Like a good wine, it takes most practicing lawyers and judges time to mature and command the land niche. Even then, one must take great interest in land cases to develop quick and good command. It was therefore envisaged that the establishment of the special land courts would for once provide the judiciary with the justification and opportunity to establish more court space for the hearing of land cases around the country. It was also anticipated that more resources would be set aside for the recruitment and training of judges to these courts

and the establishment of innovative procedures to expedite hearings. Owing to faster hearings, it was expected that routine rent seeking, there before often associated with the filing, management and hearing of land cases, would be reined. But what has been our experience so far?

**Need more courts and judges**

It hasn't been easy to expand court space for the hearing of land cases. The recruitment of judges, though providing an opportunity to select only the qualified and interested legal practitioners, usually takes long. Hitherto, we've only managed to recruit 34 judges who are thinly spread over 26 counties. A whole 21 counties out of Kenya's 47 are yet to establish the courts. While it's easy to appreciate that some of the very busy counties need several judges and that counties where land registration is pretty low may not justify the full presence of a judge, litigants and practitioners will bear witness that these numbers are grossly insufficient. A 2014 survey by the Land Development and Governance Institute found that about fifty percent of those polled still found the courts unaffordable; eighty percent perceived corruption in their system to be low and most had confidence in the court. This was motivating. According to the survey, the case for the digitization of the court registries, more courts, more judges and the specialized training of judges and officers of the courts was strongly made.

It is perhaps these concerns on the insufficiency of courts and judges that drove retired Chief Justice Willy Mutunga, through a gazette notice, to allow various magistrates to hear land cases. But a November 2016 Malindi High Court ruling annulled Justice Mutunga's notice, leaving the hearing of land cases to the exclusive jurisdiction of the land court. But this High Court decision was set aside by the Court of Appeal last month, giving leeway once again for the hearing of such cases by magistrates.

**Transition mechanism necessary**

While the intention to establish land courts was noble, we all forgot that we needed a well thought out transition mechanism. There was no way the country was going to expand court space and recruit competent judges overnight. Such oversights aren't unusual where systems are under reform. So the arrangement to have magistrate courts listen to land cases while parallel efforts to establish more courts and recruit judges ensued was innovative, much as it can be abused to undermine the very spirit of establishing the courts if not well watched. Given the 'strange menu' of pending land cases, it is likely that someone will challenge the Appeal

Court ruling. But this will only hurt innocent litigants.

The Lands Ministry, the Attorney General and Parliament must therefore move with speed to design and enact suitable legal amendments to seal the lacuna left when the constitution and support laws were enacted. Funding for the expansion of court space and the recruitment of more judges should also receive priority attention.

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